



MEMORANDUM

DATE February 13, 2012

TO Hope O'Keeffe, Associate General Counsel

FROM Justin Kaufman, Law Clerk

SUBJECT Author Permission Forms and the Online Streaming of Poetry Recordings

Question Presented

Whether various author permission forms permit the Library to make recordings of the authors' poetry available to the public via digital stream on the Library's website.

Brief Answer

The author permission forms likely permit the Library to stream its collection of poetry recordings online to the public for the limited purposes of reference, research and education.

Analysis

The author permission forms (APFs) at issue generally provide the Library with "the right to use [the recorded material] for reference, research, and educational purposes" (the "usage rights" clause). This provision indicates the intent of authors to permit the Library to make recordings available to the public, including through public performance, for certain non-commercial purposes.

Though the APFs do not specifically contemplate the online streaming of recordings, such a use should fall within the scope of the Library's usage rights, provided that (1) the Library's website does not enable visitors to download copies of the audio streams, and (2) the following disclaimer is posted or linked on the page containing the audio streams:

Streaming Audio Use Restrictions: The recordings on this page are provided for reference, research, and educational purposes only. No portion of any recording may be reproduced, redistributed, or otherwise made available by any third-party, for any purpose, without prior written authorization from the rights holder.

These measures are intended to ensure compliance with certain APFs that limit the Library's right to reproduce recorded material. Such APFs can be broadly classified according to the period in which they were used; specifically, pre-1968 and post-1968.

Pre-1968 APFs (sample permission form attached) -- generally entitled "Permission to Record and Reproduce" -- provide authors with the discretion to limit the number of times the Library can reproduce the recorded material, and explicitly restrict the for-profit public performance of the recorded material.

Post-1968 APFs (sample permission form attached) -- generally entitled "Permission to Reproduce Recorded Material in the Archive of Recorded Poetry and Literature" -- authorize the Library to provide "single-copy reproductions" of the recorded material to "educational and cultural institutions," provided the institution submits "written assurance" that it will only use the recording for "educational and cultural purposes," and that it will not further reproduce or publicly perform the recording for profit.

The Library now seeks to make its collection of poetry recordings available to the public via digital stream on its website. However, neither category of APF specifically contemplates the online streaming of recorded material. Thus, the relevant inquiry is whether the broad usage rights clause -- in combination with any language limiting the Library's right to reproduce the recordings -- permits the online streaming of recordings.

The online streaming of a sound recording constitutes a public performance of that recording. United States v. Am. Soc. of Composers, Authors, Publishers, 627 F.3d 64, 74 (2d Cir. 2010) cert. denied, 132 S. Ct. 366 (U.S. 2011). Further, copyright owners enjoy the exclusive right to publicly perform their protected works. See 17 U.S.C. § 106(4). Thus, the Library may stream a poetry recording online if the corresponding APF is properly construed as authorizing (and not otherwise restricting) the public performance of that recording.

The Library can likely stream poetry recordings governed by pre-1968 APFs online. Presumably, a single digital reproduction of a poetry recording is sufficient to stream a recording online. Thus, even where a pre-1968 APF limits the number of times the Library may reproduce the recorded material, any such limitation should not preclude the Library from making a single copy of the recording available on its website for streaming by the public.

The Library can also likely stream poetry recordings governed by post-1968 APFs online. The language of the post-1968 APFs does not limit the Library's right to use the recorded material for reference, research and educational purposes. Rather, post-1968 APFs can be construed as extending additional authorization to the Library to provide single-copies of the recorded material to educational and cultural institutions (subject to the written assurance requirement).

Further, even if the single-copy clause is properly understood as imposing a limitation on the Library's broad usage rights (i.e., for reference, research and educational purposes), a single-copy limitation does not implicate the public performance right. Thus, the post-1968 APFs do not definitively prohibit the Library from creating a single, internal copy of a poetry recording to stream online for reference, research and educational purposes.

Finally, there are a small number of APFs that do not conform to the pre-1968 or post-1968 schema, or that were uniquely modified by the author prior to execution. These APFs should be reviewed on a case-by-case basis to determine whether they permit the Library to stream a corresponding recording online.

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